95-1331

(1)

Supreme Court
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BERNICE ORTIZ,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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54 pp

Question Presented

Is the Second Circuit wrong, under this Court's decision in *Landano v. Department of Justice*, 508 U.S.___, 113 S.Ct. 2014, 124 L.Ed. 2d. 84 (1993) in authorizing the Social Security Department's refusal, under the Freedom of Information Act, to release to an elderly sick woman an unsolicited, unsigned, unsubstantiated letter when that letter attempted unsuccessfully to deprive her of her benefits when the refusal is based on an automatic blanket policy, justified, after the fact, in part because she could use that letter in a law suit against a former landlord based on other acts of slander and harassment?

Listing of Parties

The petitioner, Bernice Ortiz, is a citizen of the United States.

The Respondent, The United States Department of Health and Human Services, is an agency of the Federal Government.

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Petitioner Bernice Ortiz respectfully asks that a writ of certiorari be issued to review the judgement and opinion (the "Opinion") of the United States Court of Appeals entered November 22, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals (A1-A9) is reported at 70 F3rd 729 (1995). The Opinion of the District Court (A10-A27) is reported at 874 F. Supp. 570.

JURISDICTION

The Opinion and Judgment was issued on November 22, 1995. The jurisdiction of this Court is invoked under 28 USC 1254(1)

STATUTE INVOLVED

Pertinent provisions of 5 USC 552 are reproduced below (A-28-A-33).

STATEMENT OF THE CASE

1. Requesting the Letter

The Petitioner, an elderly woman, was systematically harassed by her landlord in order to drive her out of her home - which he eventually did. He accomplished this result not only by stopping services and destroying her home life but also by filing false complaints about her, informing authorities that she lied about her age in order to get rent subsidies and her pension. He cost her that pension until the Federal Courts remedied that deprivation. These lies and associated mistreatment precipitated a law suit (eventually settled) against the landlord for tortious tenant harassment.

The Petitioner wanted to have the full range of evidence of the landlord's harassment so she could both protect herself and pursue a law suit. Consequently, when she found out there was a letter complaining about her that had been sent to the Social Security department trying to get her thrown off Social Security and perhaps prosecuted for fraud, she requested the letter under the Freedom of Information Act. She believed she was entitled to know as a citizen, who was accusing her falsely and, as a member of the public, how the Social Security department handled such slanderous unsubstantiated accusations. The investigation, when completed, though very upsetting to her, established that she had not lied about her age and her benefits accordingly were not disturbed.

The Social Security Department has a blanket rule of denying any Freedom of Information Requests about any and all complaints filed with them. They make no individualized determinations ever and did not in this case. On the other hand, they have explicit internal rules that they do not promise confidentiality to "informants". In this case, when confronted with suggestions that stipulations could be entered into which would confine the use of the letter any way they wanted,

including just as evidence in the law suit already filed, the Social Security Department refused based on the blanket rule. At depositions and in answers they gave no reasons for following that blanket rule and never mentioned any "hot line" (presumably because their telephone hot line maintained for all complaints and allegations does not promise confidentiality).

2. The Decision of the District Court

After the appeals process was exhausted in the agency, the petitioner applied to the Federal District Court and was denied the document (examined in chambers) on the grounds that the "hot line", (which had been raised for the first time in respondent's briefs after close of discovery), meant there was an implicit promise of confidentiality to everybody who filed *any* accusation with the Social Security department.

3. The Decision of the Court of Appeals

The Second Circuit affirmed, primarily on the grounds that an unsigned letter was an implicit request for confidentiality and that use of the document in a law suit was precisely the type of retaliation that the act designated as a reason not to release a document, even to a person wrongly slandered.

Neither decision discussed, at any length, the controlling precedent from this court of *Landano, supra* which would seem to require the release of the document.

REASONS FOR GRANTING THE WRIT

The Freedom of Information Act is an important piece of legislation passed to further participatory democracy. This Court established guidelines to make sure that it was properly implemented even in cases where people implicated in heinous crimes sought to take advantage of its provisions. These guidelines, clear and established in difficult cases, are important and should be implemented for the use of citizens to know how the government deals with accusations, particularly unfounded dangerous accusations, and for those citizens to use those provisions to invoke lawful remedies. The Second

Circuit decision flies in the face of the *Landano* guidelines and must be reversed so that the Courts and agencies know they must follow this Court's analysis and teaching. If this Second Circuit misinterpretation, misapplication, and vitiation of *Landano* is not corrected by this Court, courts in the Second Circuit, perhaps all lower courts, and the agencies will continue to deny documents arbitrarily thereby destroying the rights of individuals requesting, the public seeking knowledge, and the efficient administration of this important Statute. *Certiorari* should therefore issue.

This Court has issued definitive guidelines and pronounced the governing principles for this case. *Landano v. Department of Justice, supra.* established that, given the strong presumption in favor of document release under the Freedom of Information Act, its policy, principles, and purpose, the government has a heavy burden to overcome in order to thwart release of requested documents -- one satisfied only by demonstrating a critical mass of objections, either in a cluster of crucial factors (or one overwhelming one.)

The Court in *Landano* held that numerous records compiled in an FBI investigation of an alleged criminal gang-murderer must be produced. *A fortiori,* the letter must be produced here - the petitioner, an elderly retired woman, has no criminal associations and had been absolved of any wrongdoing; was not investigated as part of an FBI criminal investigation; was subjected to suffering as a result of one unsigned, unsolicited letter; and, would promise to use it only as evidence in an ongoing law suit. Moreover, *Landano* held that the government may *not* presume that all informants (*a fortiori* all accusers, particularly false ones) are presumptively confidential sources, but must make particularized determinations (which they did not here).

Landano may be the final definitive formulation of the factors and their importance in overcoming the burden necessary to resist the federal statute's policy and principles, but it also is consistent with all Supreme Court guidance given to the public, law enforcement, civil agencies, and the Courts in

other cases. The importance of the documents to individuals justifying extensive and intensive use of the Freedom of Information Act's provisions can be found at *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. ___, 127 L. Ed. 2d. 325, 114 S. Ct. 1006, 975 F2d. 1105. For standards of believing that confidentiality was invoked see, *Renegotiation Board v. Bannercraft Clothing, Co.*, 415 US 1 (1974), 39 L. Ed. 2d. 123, 94 S. Ct. 1028. For a discussion of the strong presumption in favor of production of sought documents and the purpose of the Freedom of Information Act, see *United States Department of State v. Michael D. Ray*, 502 US___, 116 L. Ed.2d. 526 (1991), particularly at 540 and citations therein. For the importance of having a real ongoing criminal investigation see *NLRB v. Robbins Tire and Rubber Co.*, 437 US 214 (1978), 57 L. Ed. 2d. 159, 98 S. Ct. 2311. The Second Circuit ignored all these teachings and acted against the instructions delivered by this Court which is why this Court should grant *Certiorari*.

In the Second Circuit opinion to be scrutinized, it should be noted that *Landano* is only discussed as laying out general principles, while glossing over the facts (eg. "the little similarity of this case to the gang-related murder in *Landano*" is considered irrelevant.) The cases cited by that Court to establish the legal basis for refusal to release the document are lower Court opinions which pre-date *Landano* (which, actually, in the opinion of the Petitioner support a different result than the Second Circuit reached.) The Second Circuit discussion (examined following in certain pivotal analyses and rationale) satisfied neither reason nor this Court's precedent.

No Risk of Retaliation

The Second Circuit invoked the issue of "retaliation". This Court in *Landano* listed a number of circumstances where a true risk of retaliation might be found (at 2019). All but one involved violence, danger, and crime. (The one presented "strong potential for harassment" as part of an "anti-government" crusade). None of these circumstances, or anything remotely analagous, are present here.

No Harm From Release of Document

The Second Circuit held that the Petitioner's proposed use of the unsigned, unsubstantiated, accusatory letter in an ongoing law suit against the probable perpetuator was the "precise harm" that the exemption was designed to prevent. Commenting that "her candor in communications with HHS and her complaint and supporting affidavit makes explicit that this is precisely the type of situation that the statutory exemption seeks to address" (ie. suing the author of the letter), the Second Circuit proffered this as **the** factor to carry the heavy burden of proof - the protection of the unsigned utterer of rejected claims from the release of evidence of his wrongdoing to be used to prove a pattern of such wrongdoing in a civil law suit.

Even the Respondent, in answer or depositions, did not list "use in law suits" as a reason to deny the requested document. Rather at depositions they stated that the rationale for denial was fear of a "punch in the nose" and that they, using "boilerplate", never released letters alleging wrongdoing by Social Security recipients in conjunction with this worry. (This general rule has apparently always been the rule and still continues even after *Landano* established the need for a more particularized analysis).

Use of the undisclosed letter in a law suit is not a punch in the nose. (Note, the principles in the 6th Amendment and 16B of the Federal Rules of Criminal Procedure establish the right to face your accuser in formal proceedings.) One rationale of directing people to court rooms to settle disputes is to avoid physical or other means of disputation - in this case, an elderly woman was not permitted to stipulate that she would only use the letter in this non-violent way. (Protection of government whistle blowers under 5 USC 1221 indicates, that in absence of such a whistle blower statute, no protection is to be inferred for an unsolicited, non-governmental letter, which, of course could not rely on a specific promise of confidentiality). Access to the Courts by those aggrieved forms a fundamental ideal of our Constitutional democracy, not a danger that the

legislature wished to avoid in opening up access to the Government.

Unsupported claims against the Petitioner by her landlord had already resulted in considerable litigation to restore her pension. See *Ortiz v. Regan* in its various reported appearances: 777 F. Supp. 1185 (SDNY; 1991), 769 F. Supp. 570 (SDNY; 1991); 749 F. Supp. 12154 (SDNY; 1990) 980 F 2nd 138 (2nd Cir. 1992). Surely the Courts' interest in efficiency; the public's interest in preventing cut-off of entitled people, and prevention of destructive use of purposely false statements to the government agency and the Petitioner would have been better served if Petitioner had received the document she requested before litigation, to restore her pension. (Although only all the Judges and Respondent have seen the letter in question, as Petitioner's counsel never saw it, no one has disputed the belief of the Petitioner that the letter was part of a practice and pattern of harassment - and the Second Circuit in talking of its use, implicitly admits this characterization.) Perhaps before the investigation (and other litigation) was complete, the malicious submission could have been protected - but not after it was found to be without basis.

One unsigned unsolicited letter no longer considered viable is neither compiled nor part of an ongoing criminal investigation. It should be therefore available for any lawful use including a law suit.

In fact, the aggrieved party was the Petitioner. (The person now protected from release of this wrongful slander had probably committed a crime under 18 USC 1001.) Even though the investigation has terminated, this letter still poses a worry to the Petitioner and a threat to her in the future with a letter claiming fraud lurking in her files (and she, like the public, should know how and why the government launches investigations on such unsolicited unsupported assertions without any knowledge of who filed it, except that it is not from a law officer.) It is her right that is crucial - and the denial which hurts her. Seeking her lawful legal remedies should

not diminish her rights to relief under the Freedom of Information Act.

Were she not so candid that she wanted to confine her protests to a Court, but merely just asked for it would the Second Circuit then grant her request? Surely, confining its use to the Courts, is nothing the Courts should call "harm." (Cf. the agency's obligation to work with the requestor *Ruotola & Ruotola v. Department of Justice*, 53 F. 3rd. 4 (2nd Cir; 1995).

Privacy

Whose privacy is at stake? The Second Circuit decided it as the person who violated Petitioner's rights. The Petitioner believes this Court has established that it is her right to privacy that is at stake - not the person who harmed her.

The fundamental principle has been stated by this Court. "The privacy interest protected...`encompasses the individual's control of information concerning his or her person." *United States Department of Defense v. FLRA, supra.* (Legislative history supports this interpretation 21974 US-CAN 6267, 6291-2).

An elderly woman dependent on Social Security ("An act...unusually protective of claimants" - *Bowen v. City of New York*, 476 US 467 (1986) at 480) had her benefits placed in jeopardy by a false malicious unsigned accusation. It is she who is the victim who needs protection, not the liar who was harassing her. (See for a recognition of this point in the same jurisdiction, *Jane Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (SDNY; 1980) at 579-80). It is her privacy which has been violated, not the harassing slanderer who smeared her to the government.

No Request or Expectation of Confidentiality

The Second Circuit, in its search to find a request for confidentiality (since the letter was not received pursuant to a proffer of such an assurance) relied on two factors: (1) The

lack of signature and (2) The existence of a Hotline for phone complaints.

i.

Not Signing is Not a Request for Non-Release

The Court argued for "a common sense interpretation of anonymity as the desire to keep one's identity secret for any and all purposes" rejecting petitioner's argument that "(I)f the letter-writer's expectation was that the letter would be kept secret...there would have been no need for the letter-writer to sign the letter. The lack of signature is proof-positive that the letter-writer anticipated that the letter might be provided to Mrs. Ortiz." Regardless of which interpretation is more reasonable, and petitioner asserts she has the better of the argument since the letter (which in no way apparently ever requested confidentiality but only was unsigned) must be judged under the standard that a particular request must be judged on its individual merits - it must be established for the particular document rather than inferred even for those who provide the FBI with information. See *Landano* at 2021-23. But, the agency itself made no such interpretation, but, instead merely invoked "boilerplate". (They do not even have a particular policy that unsigned letters shall be construed as requests for non-release, even assuming that is reasonable.) Nor was there an individual interpretation that this letter, read in conjunction with no signature, meant that it was to be kept away from the reader.

In fact, with the lack of signature, it made it more difficult to conduct an investigation or inquire whether such non-release or "confidentiality" was, in fact, expected or even sought. (No such claim has been made on the basis of the text of that letter but rather the Second Circuit was concerned that the issuer of the false accusations spoke in such a way that the Petitioner could identify that individual - which Petitioner had already in "candor" affirmed. If it had not been that individual, Petitioner was prepared to stipulate that the matter would end - all she sought was to protect herself from that individual who was known to harass her.) The Second Circuit focused

on the inflammatory language in the letter - apparently the greater the slander, the more unsubstantiated the claim, the greater the protection generated for its sponsor under this analysis. To state such a position is to prove its absurdity - and how far the Second Circuit has strayed from the paths established by *Landano.*

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Phone Hotline Does Not Offer Confidentiality for Letters

The agency, in depositions and proffered defenses, never raised the issue of the Hotline, at all (let alone implying an assurance of confidentiality) relied on by the District and Appellate Courts. There is nothing in the record that indicates the Hotline was ever connected to the one page letter; was known by the writer of that letter; or invoked by anyone in the Agency to justify refusal under the Freedom of Information Act. Moreover, the Social Security Department could not so justify a claim of confidentiality offered, as not only is none promised on that Hotline, but also internal Social Security interpretations prevent such promises. "When the question of confidentiality is raised by an informant or a prospective informant, SSA: ...does not offer or discuss a guarantee that the informants identity will never be disclosed." POMS GN 04120.0120. Rather, "Information obtained from third parties, whether solicited or volunteered **cannot** be withheld from number holders when the information becomes a part of the claims folder." (emphasis added) POMS DNI 30501.030. POMS are the Social Security Administration's interpretations of statutes and regulations. *Ruppert v. Secretary of the United States Department of Health and Human Services*, 671 F. Supp 151 fn 3 at p. 158. (E.D.N.Y. 1987).

Not Compilation in Ongoing Investigation

Under the pre-*Landano* standard of compilation, this one unsigned letter sent in, out of the blue, was not part of a "compilation of information...for the purpose of law enforcement", *Ferguson v Federal Bureau of Investigation*,

957 F2nd 1059 (2nd Circ. 1982). An ongoing investigation appears to be usually essential. See eg. *NLRB v. Robbins Tire and Rubber Co., supra,* 57 L. Ed. 2d. 159, 98 S. Ct. 2311 and in the same jurisdiction *Malizia v. United States Department of Justice*, 519 F. Supp. 338 (SDNY 1981). Maybe before the investigation established there was no wrong doing on which to deprive the petitioner or to sanction her, the malicious submission could have been protected, but such an argument is not available here.

One letter, one lie, was sent to the Social Security Department. This was part of a pattern of harrassment intended to drive an elderly lady out into the streets and impoverish her.

Petitioner sought that letter and had a right to that letter. This Court has given that right to many others in much less appealing circumstances. Petitioner and the public have a right to see that unsigned letter; she to use it in a law suit, the public to know what goes on in that agency. No invocation of obsolete lower court cases, no conjectures about Hotlines, no verbal stretching of compilation and investigation should prevent what is obvious - this woman has a right to see a letter, which was found baseless, and on which harm to her was and may be based.

CONCLUSION

The Writ of Certiorari should issue.